IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 6112 OF 1996

ALONGWITH

WRIT PETITION NO. 6113 OF 1996

Smt. Sukanya Apte & anr. .... Petitioners

versus

State of Maharashtra and ors. ..... Respondents.

Shri Sachin Shetye for the petitioner
Shri S.K.Chincholikar AGP for respondents 1 to 3.
Mrs. Anjali Helekar for respondent no.4.

CORAM; A.P. DESHPANDE, J.
DATED; 26TH FEBRUARY, 2007

JUDGMENT;

1. Heard the learned counsel for the parties. As the common question of law and fact emerges in the writ petition, I heard the writ petitions together and the same are being disposed of by this common judgment.

2. The petitioner no.1 is the Secretary of a public trust namely, Nagrik Sahayya Kendra, which administers a school by name Dnyaneshwar Vidyalaya of which the petitioner no.2 is the Head Mistress. The respondent no.4 in both the petitions, were appointed long back and at the fag end of their service career they have been compulsorily retired from service. Both the respondents were made to retire about two to two and

half years prior to their attaining the age of superannuation. The age of superannuation in regard to class III members of the staff is 58 years. The respondent no.4 in both the writ petitions, aggrieved by the action of compulsory retirement, approached the Presiding Officer, School Tribunal, by contending that the order of compulsory retirement tantamount otherwise termination of respondent no.4 from service and the tribunal upholding the contentions raised by respondent no.4, has allowed the appeals and by setting aside the order of termination were directed to be continued in service till the age of superannuation. Aggrieved by the judgment and order passed by the tribunal, the present writ petitions are filed by the Secretary of the society. Interim relief in terms of prayer clause (b) was granted subject to the condition that the petitioner pays the respondent no.4 their salary every month.

3. The learned counsel for respondent no.4 submits that some of the payments are made. However the respondent no.4 has yet to receive certain amounts subject to which the stay was granted.

4. The service conditions of the employees working in private schools are governed and regulated by the MEPS Act and Rules made thereunder. Rule 17 lays down the age of superannuation and it provides that an employee

other than class IV employee shall retire from service on the date on which he attains the age of 58 years. It is thus clear that the respondent no.4 in both the writ petitions had a legal right to continue in service till they attain the age of 58 years. This legal right, to continue in service till completion of 58 years, has been violated by the petitioners by compulsorily retiring the respondent no.4 prior to their attaining the age of superannuation. It may be incidentally stated that under the Act or the Rules, there is no provision to compulsorily retire an employee from service. So the question that fell for consideration before the tribunal was, as to whether school management can compulsorily retire an employee before attaining the age of superannuation in view of the provision of section 4(6) of the Act. Section 4 sub section (6) reads thus:

> "No employee of a private school shall be suspended, dismissed or removed or his services shall not be reduced in rank, by the management, except in accordance with the provisions of this Act and the rules made in that behalf."

It is thus obvious that action on the part of the management in regard to dismissal or removal has to be backed by a provision in that regard, under

the provisions of the Act or the rules. Ordinarily the management would not have compulsorily retired the respondent no.4 from service but the action seems to has been taken under the Government Resolution dated 9-9-1998 which is filed at Exh.A in Writ Petition No.6112 of 1996. The said G.R. did provide for compulsory retirement and by the said G.R. action has been taken by the management in compulsory retiring the respondent no.4. It is a settled position in law, that if the field is occupied by a statute, then the State Government cannot have recourse to the powers under Article 162 of the Constitution of India and change the service conditions by invoking administrative powers. The provision of the Act and rules were never amended so as to permit compulsory retirement. In similar facts a Division Bench of this court had occasion to deal with the same question. While disposing of W.P. No. 1772 of 1997 by an order dated 14th July 2006, the Division Bench clarified in the light of the G.R. dated 9-10-1990 which goes to explain the stand of the Government that the amendment of the rules of 1981 are required to be made for giving effect to the G.R. dated 9-9-1988. The Government thus accepted before the Division Bench, the position that the provision for compulsory retirement can be made only by amendment in the rules of 1981. The court concluded that until the rules of

1981 are amended, the procedure of compulsory retirement for teaching or non-teaching staff of private aided school sought to be introduced by Resolution dated 9-9-1988, cannot be made effective. It has been recorded in the said order that the Government accepts the said position.

5. The same issue has been adjudicated by a learned Single Judge of this court in a judgment reported in **2006(2) Mh.L.J. page 862.** The learned Single Judge has held that the Government Resolution dated 9-9-1988 cannot be permitted to override the provisions of section 4(1)(6) of the Maharashtra Employees of Private Schools (Conditions of Service) Resolution act, 1977. As there is no provision either in the act or rules which enables the management to order compulsory retirement, the same is impermissible in law. I am in complete agreement with the view taken by the learned Single Judge. In the absence of amendment in the rules, provisions of compulsory retirement cannot be introduced by issuing a Government Resolution for the reason that rules cannot be amended by executive fiat. Thus the impugned order passed by the tribunal quashing and setting aside the order of compulsory retirement is legal and proper and it does not call for any interference in these writ petitions. In the result, the writ petitions fail and are dismissed.

6. At this stage the learned counsel for respondent no.4 submits that though the salary has been paid as directed by this court till the date of superannuation, the respondent no.4 in both the petitions are not paid the arrears of salary/emoluments in regard to the scale admissible under 5th Pay Commission for certain period. Suffice it to state that, it shall be open for the respondent no.4 to move the appropriate forum for recovery of the amounts.

7. In the result, the writ petitions are dismissed with no orders as to costs. Rule discharged.

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